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JPMorgan Chase Bank, N.A.
erroneously sued as JPMorgan Chase
Bank, a Corporation

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MEDHI HAGHIGHI, an Individual,
JANA LEE HAGHIGHI, an Individual,

Plaintiffs,

v.

JPMORGAN CHASE BANK, a Corporation; and DOES 1 through 50, inclusive,

Defendants.

CASE NO.: CV12-08967-DSF-AJW

REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT OF PLAINTIFFS' FIRST AMENDED COMPLAINT

DATE; September 8, 2014
TIME: 1:30 p.m.
CTRM: 840

Action Filed: August 19, 2010

Action Removed: October 17. 2012

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Defendant JPMorgan Chase Bank, N.A. erroneously sued as JPMorgan Chase Bank, a Corporation ("JPMorgan"), respectfully submits this Reply to Plaintiffs' Opposition to JPMorgan's Motion for Summary Judgment, or in the alternative, Partial Summary Judgment ("Motion") to the first, second, and fifth causes of action in the First Amended Complaint ("FAC") of plaintiffs Medhi Haghighi and Jana Lee Haghighi ("Plaintiffs").

I. SUMMARY OF ARGUMENT

Plaintiffs' Opposition attempts to resurrect issues already decided by this Court, and confuses the standard of review for a motion for summary judgment with the standard for a pleading to survive demurrer, but it does not offer any substantive basis for disputing the fact that JPMorgan is entitled to judgment as to Plaintiffs' remaining claims. Moreover, the claims of procedural defects are both untrue and unfounded, and Plaintiffs' efforts to rewrite deposition testimony in order to create an issue of fact do not provide a legitimate reason for denying the motion.

II. JPMORGAN IS ENTITLTED TO SUMMARY JUDGMENT AS TO ALL PLAINTIFFS' REMAINING CLAIMS

A. The Motion was Timely Filed Following Unsuccessful Meet and Confer Efforts

Plaintiffs contend that JPMorgan's counsel failed to comply with the pre-filing conference of counsel pursuant to Local Rule 7-3. However, while JPMorgan's counsel did send Plaintiffs' counsel a meet and confer letter on July 14, 2014, well before the motion was filed, and then spoke with Plaintiffs' counsel on July 23, 2014, the focus of Plaintiffs' counsel's comments was on inappropriate personal attacks against JPMorgan's counsel. (*See* Declaration of Mikel A. Glavinovich, ¶¶ 2-3.) The nature of these comments included, but was not limited to, accusations that JPMorgan's counsel followed Plaintiffs' counsel to Hawaii, and made appearances in disguise throughout this litigation. (*See* Palmieri Decl., Exhibit G.) Needless to say such comments did not lead to a substantive discussion of the issues addressed in this

motion, but that is not due to any conduct by JPMorgan's counsel.

Plaintiffs also contend that this motion is untimely because discovery was complete in March of 2013. What Plaintiffs do not say, though, is that JPMorgan agreed to several depositions after March of 2013, and Plaintiffs' counsel in fact just recently asked to reschedule the deposition of JPMorgan's expert, more than one year after Plaintiffs' counsel cancelled the initial deposition date. (Glavinovich Decl. ¶ 4.) Furthermore, the Court may enter summary judgment up to, and including at, the Final Pretrial Conference. (*Portsmouth Square, Inc. v. Shareholders Protective Committee* (9th Cir. 1985) 770 F.2d 866, 869.)

Finally, despite their procedural criticisms of JPMorgan's motion, Plaintiffs ask this Court to accept its Opposition although it exceeds the page limitation. (*See* Opposition at 3.) More specifically, Plaintiffs' Opposition includes a three page introduction and a twenty four page memorandum of points and authorities, and then Plaintiffs added an additional three page "supplement" the day after the opposition was due. This is just the latest in a series of Plaintiffs' unwillingness to abide the rules of this Court, and JPMorgan requests that it be the last. JPMorgan similarly requests that this Court deny Plaintiffs' improper request to amend the complaint to add an additional party, or remand this action to the Ventura County Superior Court, as the Court has already denied both such requests. (*See* Court's Orders dated January 28, 2014 and March 12, 2014.)

B. The Fact that a Demurrer was Overruled in a Separate Action Has No Bearing on Whether Summary Judgment is Appropriate in this Action

In order to preclude a grant of summary judgment, the non-moving party must do more than show that there is some “metaphysical doubt” as to the material facts. (*Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986) ("*Matsushita*").) Rather, the non-moving party must set forth “‘specific facts showing that there is a genuine issue for trial.’ ” (*Id.* at 587

(quoting Federal Rules of Civil Procedure, § 56(e).) The substantive law defines which facts are material. (*Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2205, 91 L. Ed. 2nd 202 (1986).) Under Rule 56(e), the adverse party must allege specific facts supported by affidavit that raise triable issues. (*Id.*)

In this case, rather than allege specific facts, Plaintiffs attempt to re-write the existing evidence and contend that because their state court complaint survived demurrer, this Court may not grant summary judgment. However, the fact that a complaint survives demurrer means only that *if* the facts alleged are true, plaintiff has an actionable, though not necessarily successful, claim. Where, as here, the case is far more along, it is only those facts which have been proven true – or untrue – that control whether summary judgment is appropriate. Thus, because Plaintiffs cannot ignore the fact that the regulation on which their argument is based was not in effect at the time in question, and their own expert admitted JPMorgan was within its discretion when it handled the late and insufficient payments as it did, they cannot demonstrate there is a genuine issue for trial.

C. Plaintiffs' Reliance on 12 CFR 1026.36 is Misplaced as the Regulation Did Not Apply to Partial Payments at the Time in Question

Plaintiffs' Opposition places great weight on the fact that the current language of 12 CFR 1026.36 has remained similar since October 1, 2009. (*See* Opposition at 21-22.)[1] However, there is no support for Plaintiffs' argument that this regulation applied to partial payments at the time in question. Indeed, JPMorgan's actions in 2010 are consistent with comments made in the Federal Register regarding the lack of *any* Federal regulations that require partial payments to be handled in a certain manner:

> Outreach to consumer and industry stakeholders revealed

[1] The current version of 12 CFR §1026.36, became effective on January 10, 2014. (*See* 78 Fed.Reg. 32547 (May 31, 2013).)

> that partial payments are currently handled in a variety of ways: Some servicers do not accept partial payments, some servicers apply partial payments, and some servicers send partial payments to a suspense or unapplied funds account. *Previously, there were no Federal regulations that governed such accounts* …

(78 Fed. Reg. 31, 10954 (2013) to be codified 12 CFR §1026 (emphasis added).)

As such, Plaintiff cannot establish that JPMorgan reported inaccurate information – knowingly or otherwise in violation of any regulation.

Moreover, as stated in JPMorgan's opening brief, Plaintiffs cannot merely rely on their expert's testimony as to what JPMorgan ought to have done, when research shows that it was not standard practice to remind borrowers that partial payments would be placed in suspense. For instance, Plaintiffs' expert testified that it was industry practice to notify borrowers if their payment was insufficient. (UF No. 48.) However, his testimony in contradicted by the Federal Register.

In 2013, the Federal Register discussed proposed rules designed to regulate how and when a borrower much be notified that a partial payment was place in a suspense account. It concluded, "… the Bureau does not believe it is appropriate to require servicers to send an annual disclosure on the suspense account for the first three years law in existence at the time indicated", thus the proposed rule was modified "to provide that if funds are being held in a suspense account, the amount held in any suspense account must be disclosed in the past periodic breakdown on the periodic statement," however "the servicer may move the message about what must be done for the funds to be applied to a separate page of the statement, or may send this disclosure are part of a separate letter." (FR Vol. 78, No. 31 10967-10968 February 14, 2013.) Thus, Plaintiffs cannot reasonably contend that JPMorgan engaged in anything untoward when it applied Plaintiffs' insufficient payments to a suspense account, but failed to send Plaintiffs yet another letter explaining why the mortgage payment increased in December 2009. (UF Nos. 1-55.)

Nonetheless, Plaintiffs argue that while it was within JPMorgan's legal discretion to handle the partial and late payments in the manner it did, JPMorgan

should be held to some other standard based solely on the opinion of their expert. (*See, e.g.*, Opposition at 23-31.) However, because Plaintiffs are seeking to hold JPMorgan legally liable, their allegations must have some basis in law and not simply based on a belief that lenders are required to go above and beyond their regulatory duties in order to accommodate borrowers who refuse to comply with the terms of their loan.

Indeed, it bears reviewing Mr. Kagan's, Plaintiffs' expert, original testimony, as affidavits that offer testimony in direct conflict with prior deposition testimony of the same declarant may not be used to create issue of dispute to defeat a summary judgment motion.[2] Thus, what controls is as follows:

> **Q:** … Taking the first instance, if a borrower makes an insufficient payment, is it your understanding, based on your expertise, that the lender may report that to a credit agency?
>
> **A:** Usually you don't see it with an insufficient payment. You do see it when they don't make a payment.
>
> But they would have the right under – *it's my understanding they would have the right to report based on the facts.*
>
> **Q:** *That's for an insufficient payment as well as nonpayment?*
>
> **A:** *Correct.*

(Declaration of Mikel A. Glavinovich filed with moving papers, Exhibit 1 at 25:12-21. [Emphasis added.])

In response to further questioning, Mr. Kagan also said:

> **Q:** Were those, the two [payments] sitting in the suspense account, could you see whether or not those were full payments, including the additional approximately $200 to cover the insurance?

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[2] Similarly, Plaintiffs' suggestion that their expert was not permitted to complete his testimony is not support by the transcript, and Plaintiffs' counsel had ample opportunity to question the expert himself if he thought the testimony was in any way incomplete or confusing.

> **A:** No. I believe it was short the $200.
>
> *But it was at the discretion of Chase* whether they wanted to apply the money towards the payment as – even if it was $200 short, when the next payment came in, they could have applied one full payment, including that extra $200, if they so chose, and they could have also collected for the late charges.

(Glavinovich Declaration, Exhibit 1 at 27:7-17, filed with initial moving papers. [Emphasis added.].)

Finally, as to whether he could testify that JPMorgan engaged in inaccurate or incomplete credit reporting, Mr. Kagan responded in the negative:

> **Q:** Have you seen any evidence that there were inaccurate or mistaken reports made to credit agencies regarding plaintiffs' loan payments by Chase?
>
> **A:** Because of the way the report reads and because of the other information I have, *it's impossible to make a correlation.*

(Glavinovich Declaration, Exhibit 1 at 34:12-17, filed with initial moving papers. [Emphasis added.].)

In other words, Mr. Kagan claims to be a credit expert, has reviewed the Plaintiffs' credit reports and several other documents made available to him, but he cannot determine whether JPMorgan made any inaccurate or incomplete credit reporting. Thus, Plaintiffs cannot possibly prove this key element of their claim.

Not surprisingly, Plaintiffs have apparently asked Mr. Kagan to revise his opinion, but they still do not offer any substantive basis for this revised opinion. Furthermore, given that neither Plaintiffs nor Mr. Kagan offer sufficient explanation for this inconsistent testimony, it should be treated as an improper effort to create a genuine issue of fact where there is none. "Courts have held virtually unanimously that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by filing an affidavit contradicting earlier deposition testimony."

(*Id*. *citing Kennedy v. Allied Mut. Ins. Co.* (9th Cir. 1991) 952 F.2d 262 [other citations omitted].) The reason for this rule is simple: "if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." (*Id.* at 266 [citations omitted].)

In this case, the revised opinion of Mr. Kagan is nothing more than a needless effort to confuse the issues before this Court.

III. CONCLUSION

Based on the foregoing, JPMorgan respectfully request that the Court grant its Motion as to the first, second, and fifth causes of action alleged in Plaintiffs' First Amended Complaint.

DATED: August 25, 2014

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By: /s/ Mikel A. Glvinovich
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JPMorgan Chase Bank, N.A. erroneously sued as JPMorgan Chase Bank, a Corporation